



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 29, 2004

Mr. Alan J. Bojorquez  
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OR2004-10893

Dear Mr. Bojorquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215656.

The City of Dripping Springs (the "city"), which you represent, received a request for information relating to the city's proposed centralized sewage system. You state that the city will make much of the responsive information available for review. You claim, however, that portions of the information at issue are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

Initially, we note that portions of the submitted information are made expressly public under section 552.022 of the Government Code. Section 552.022 enumerates several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law," and provides in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (5), (16). The documents you have submitted as Exhibit F include executed contracts and invoices related to the expenditure of funds by the city, which are subject to section 552.022(a)(3) of the Government Code. The documents you have submitted as Exhibit E include a completed estimate of the need for public funds, which is subject to section 552.022(a)(5) of the Government Code. Furthermore, the attorney fee bills you have submitted as Exhibit D are subject to section 552.022(a)(16) of the Government Code. Pursuant to section 552.022 this information, which we have marked, is required to be released unless it is expressly confidential under other law.

The city seeks to withhold the submitted information under sections 552.103, 552.107, and 552.111. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived) 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. The city therefore may not withhold the portions of the submitted information that are subject to section 552.022 pursuant to these exceptions.

You contend, however, that some of this information is protected by the attorney-client and attorney work product privileges. As you acknowledge, the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of

Evidence 503, and the attorney work product privilege is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your claims pursuant to Rule 503 and Rule 192.5.<sup>1</sup>

Rule 503 of the Texas Rule of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged

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<sup>1</sup> We note your contention that the information you seek to withhold from the submitted fee bills is "excluded from the list of examples set out in section 552.022(a)" because, as information protected by the attorney-client privilege, it is confidential by law. Because the fee bills at issue are subject to section 552.022, we will address your claim under the attorney-client privilege for this information pursuant to Rule 503 in accordance with *In re Georgetown*.

and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The submitted attorney fee bills reveal or reflect information communicated between the city and its representatives, consultants, and attorneys, and you indicate that the communications at issue were intended to be confidential. You have also identified several principal parties to the communications, and you indicate that the communications were made for the purpose of providing legal services to the city. Based on your representations and our review, we agree that some of the information you seek to withhold from the submitted fee bills is protected by the attorney-client privilege and is therefore excepted from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. We have marked the information in the fee bills that may be withheld under Rule 503. We have also marked documents in Exhibit F that are subject to section 552.022(a)(3), but that consist of confidential attorney-client communications made in furtherance of the rendition of legal services. The city may also withhold this information pursuant to Rule 503 as information protected by the attorney-client privilege. The remaining information in the submitted fee bills, however, does not reveal confidential attorney-client communications, or pertains to communications involving parties whom you have not identified as being in a privileged relationship with the city or its representatives, attorneys, or consultants. We therefore find the remaining information in the submitted attorney fee bills is not protected by the attorney-client privilege and may not be withheld on that basis.

We next address your claim under Rule 192.5 with respect to the remaining information in the submitted attorney fee bills. Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under Rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed

in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under Rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in Rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that the submitted attorney fee bills also reveal core work product that reflects the mental impressions and conclusions of city attorneys and was prepared in anticipation of litigation. Based on your representations and our review, we agree that a portion of the remaining information in the attorney fee bills reveal mental impressions and legal strategy, opinions, or conclusions. We have therefore marked the core work product in the attorney fee bills that the city may withhold pursuant to Rule 192.5. The remaining information in the fee bills, however, does not consist of core work product and may not be withheld on that basis. The portions of the attorney fee bills that are not protected under Rule 503 or Rule 192.5 must be released to the requestor.

We also consider your claim under the consulting expert privilege for information in Exhibits E and F that is subject to section 552.022. The consulting expert privilege is found in Rule 192.3(e) of the Texas Rules of Civil Procedure. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7. You indicate that the city contracted for advice and consulting services from several expert consultants in connection with a wastewater permit application relating to the sewage system project at issue in the request. You further contend that the services provided by the city's consultants were provided in anticipation of litigation relating to the permit application. We understand you to represent that the city does not anticipate calling these experts as witnesses in potential litigation challenging the issuance of the permit. Based on your representations and our review, we find that an estimate of the need for public funds contained in Exhibit E and several contracts and invoices contained in Exhibit F reveal the identities and opinions of the city's consulting experts. We therefore find the city may withhold this information, which we have marked, pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

We now turn to your claimed exceptions with respect to the remaining submitted information, which is not subject to section 552.022. You contend that the information at issue is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." See Open Records Decision No. 588 (1991). In this case, you state, and provide documentation showing, that the requestor has sought a contested case hearing with the Texas Commission on Environmental Quality regarding the proposed permit. Based on your representations and our review, we determine that litigation in this matter, in the form of a contested case under the APA, was reasonably anticipated by the city prior to the date the city received the present request. We further find that the submitted information relates to the anticipated litigation for purposes of section 552.103(a). We therefore determine that section 552.103 is applicable to the remaining submitted information.<sup>2</sup>

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<sup>2</sup> Based on this finding, we do not reach your other claimed exceptions to disclosure for the remaining information.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the case at issue is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we have marked information in the submitted attorney fee bills that may be withheld under Rule 503 of the Texas Rules of Evidence as information protected by the attorney-client privilege. We have also marked information in the submitted attorney fee bills that may be withheld under Rule 192.5 of the Texas Rules of Civil Procedure as information protected by the attorney work product privilege. The remaining information in the attorney fee bills is not excepted from disclosure and must be released to the requestor. We have marked information that the city may withhold under the consulting expert privilege pursuant to Rule 192.3 of the Texas Rules of Civil Procedure. The city may withhold the remaining submitted information at this time pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor

should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

DRS/jev

Ref: ID# 215656

Enc: Submitted documents

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